Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

KRIS LINDQUIST,

Petitioner,

v.

STEVEN LOBECK and ANDREW WORONKA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA COURT OF APPEALS

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38 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the Florida Court of Appeals' decision conflict with the decision of the Sixth Circuit Court of Appeals in *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998) which found a constitutional duty under identical facts, warranting review by this Court?

2. Does the Florida Court of Appeal's decision that there was no substantive due process violation because the injuries did not occur while "in custody" conflict with the decision of the Sixth Circuit Court of Appeals in *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997), warranting review by this Court?

3. Does Florida Court of Appeals' decision conflict with the decision of the Third Circuit Court of Appeals' decision in *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996), which found a substantive due process violation under the "state created danger" theory, warranting review by this Court?

PARTIES TO THE PROCEEDINGS

Kris Lindquist

Andrew Woronka

Steven Lobeck

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PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA COURT OF APPEALS

Petitioners pray that a Writ of Certiorari be issued to review the Judgment of the Florida Court of Appeals entered in this cause on January 28, 1998.

OPINION BELOW

The opinion of the Florida Court of Appeals is reported at *Lindquist v. Woronka*, 706 So. 2d 358 (Fla. Dist. Ct. App. 1998) (*per curiam*). This opinion is printed in the appendix (A.1) to this petition. The judgment of the Florida Supreme Court, refusing to review the decision of the Florida Court of Appeals, is unreported and is printed in the appendix (A.2) to this petition.

JURISDICTION OF THIS COURT

The Florida Court of Appeals issued its opinion on January 28, 1998. A timely petition seeking discretionary review was filed with the Florida Supreme Court. The Florida Supreme Court issued an order on July 27, 1998 declining to exercise review of the court of appeals. This petition was filed within 90 days after the entry of the Florida Supreme Court's decision declining to exercise discretionary review. This case concerns an interpretation of 42 U.S.C. §1983 and the due process clause of the Fourteenth Amendment. This court has jurisdiction pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. AMEND. XIV, §1 provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process or law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The Plaintiff brought this action against the Defendants Lobeck, Woronka, City of Riviera Beach, Joseph Proia and Donna Kallio in the Circuit Court of the 15th Judicial Circuit, Palm Beach County Florida, seeking recovery for personal

injuries suffered on January 31, 1993. (R.1-14).[1] The federal constitutional and statutory questions addressed in this Petition were first raised by the Third Amended Complaint. (R.162-182). The Third Amended Complaint was the first pleading in this matter that sought recovery against the defendants under 42 U.S.C. §1983 for violations of Kris Lindquist's rights to substantive and procedural due process under the Fourteenth Amendment. (Third Amended Complaint, Counts V-VIII). The defendants moved to dismiss the Third Amended Complaint for failure to state a cause of action. (R.224-225,226-229, 230-234). The circuit court granted the Defendants' motion to dismiss, but also gave the Plaintiff leave to amend the complaint. (R.289-295). The Plaintiff then filed a Fourth Amended Complaint, which again raised federal claims under 42 U.S.C. §1983 and the Fourteenth Amendment. (R.307-325).

The complaint at issue in this petition is the Fourth Amended Complaint. (R.307-325). This complaint sought recovery against the City of Riviera Beach, Lobeck and Woronka for negligence (Counts I and II) and against these same Defendants for deprivation of Kris Lindquist's substantive and procedural due process rights (Counts III and IV). (R.307-325).[2] In response to the Fourth Amended Complaint, the Defendants moved to dismiss for failure to state a cause of action. (R.326-335, 336-338, 339-340). The City's motion argued that the actions alleged in the negligence counts were judgmental decisions, therefore the

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[1] Pursuant to Supreme Court Rule 14(b)(i) references to the record ("R") are to the record on appeal filed with the Florida Court of Appeals.

[2] Joseph Proia and Donna Kallio settled the claims against them and were not named in the Fourth Amended Complaint.

City was protected by sovereign immunity. (R.337). All three Defendants moved to dismiss Counts III and IV on the grounds that these counts failed to state a cause of action under the federal civil rights act, 42 U.S.C. §1983. (R.337, 339).

After receiving briefs and hearing argument on these motions, the Circuit Court for Palm Beach County, Florida granted the City's motion to dismiss Count II, and granted all of the Defendants' motions to dismiss Counts III and IV. (R.363-366). The Plaintiff then filed a timely notice of appeal of the circuit court's order dismissing Counts III and IV against the Defendants Woronka and Lobeck. (R.383-384, 385-388).[3]

The Florida Fourth District Court of Appeals rendered its decision on January 28, 1998. In that decision, the court of appeals held that the due process clause of the Federal Constitution did not impose a duty on either officers to protect Kris Lindquist, even though there was a "special relationship" between the officers and Kris Lindquist, and even though the officer's actions had increased the harm to Kris Lindquist. 706 So.2d at 360. A notice to invoke discretionary jurisdiction was timely filed with the Florida Fourth District Court of Appeals on February 25, 1998. The Plaintiff then filed a timely petition for discretionary review with the Florida Supreme Court under FLA. CONST. ART. V, §3(b)(3) and Fla. R. App. Proc. 9.030(2)(A)(ii).[4] On July 27,

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[3] The common-law claims in Count I remained against the City, thus the order dismissing the constitutional claims against the City was not a final appealable order against the City.

[4] Under Fla. R. App. Proc. 9.030(a)(2)(A)(ii), the Florida Supreme

1998 by a 4-3 vote, the Florida Supreme Court declined to exercise discretionary review. That same order provided that "[n]o motion for rehearing will be entertained by the Court."

ARGUMENT

This case falls directly under the criteria listed by this court for discretionary review under Supreme Court Rule 10. Under Rule 10(b), a "compelling reason" warranting review exists when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals."

In this case, the Florida Court of Appeals' interpretation of the Fourteenth Amendment's due process clause and 42 U.S.C. §1983, directly conflicts with the decisions of three federal circuit courts of appeal. First, it directly conflicts with the holding of the Sixth Circuit Court of Appeals in *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998). This case and the *Davis* case concerned identical facts, yet in this case no constitutional violation occurred, while in *Davis* the court found a constitutional violation. Second, the Florida Court of Appeals' decision that there was no constitutional violation because the injuries occurred after Kris Lindquist was released also directly conflicts with the Sixth Circuit Court of Appeals' decision in *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997). Third, the Florida Court of Appeals' decision conflicts with the Third Circuit Court of Appeals' decision in *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996) by

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Court has discretionary jurisdiction to review decisions of a district court of appeal that expressly construe a decision of the state or federal constitution.

reaching different results with similar facts under the "state created danger" theory. Thus, the decision should be reviewed.

I. The Florida Court of Appeals' decision conflicts with the decisions of the Sixth Circuit Court of Appeals in *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998) which found a constitutional duty under identical facts.

The Florida Court of Appeals' decision directly conflicts with the Sixth Circuit Court of Appeals' decision in *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998), which found a constitutional deprivation under identical facts.[5] It is impossible to reconcile the Florida Court of Appeal's opinion with the sixth circuit's opinion in *Davis*.

In *Davis*, the plaintiff became intoxicated one evening and tried to enter a shelter where he had been staying. The shelter staff refused to admit him because he was intoxicated. The plaintiff became violent, and the shelter called the police. 143 F.3d at 1023. The plaintiff was arrested by two police officers, who took the plaintiff to the county jail. The jail was full, and the two police officers were instructed by the desk sergeant "'to release [the plaintiff] at the county jail if he was not so drunk that he would be a hazard to himself.'" 143 F.3d at 1023. Instead of releasing the plaintiff at the jail, the defendants released him outside of town on a heavily

[5] The *Davis* case was decided before the Florida Supreme Court's order declining discretionary review in this case, and after the court of appeals' decision.

traveled road with few street lights and no sidewalk. 143 F.3d at 1023.

After he was released from custody, the plaintiff made his way to a house, where he asked one of the residents to call the police. A third police officer came to the house and, according to the plaintiff, this police officer refused to give the plaintiff a ride back to town. 143 F.3d at 1023. The plaintiff then left the house and was hit by a car seven minutes after this third police officer left. 143 F.3d at 1023. The plaintiff's blood alcohol was .176 at the hospital, approximately 48 minutes after the last officer left him. 143 F.3d at 1023.

The plaintiff sued the police officers under 42 U.S.C. §1983 for deprivation of his right to substantive due process. The defendant police officers moved for summary judgment, arguing that no constitutional violation occurred. . The district court denied the motion, and, on appeal, the sixth circuit affirmed.

The sixth circuit first began its analysis of whether the plaintiff had established a violation of a constitutionally protected right. 143 F.3d at 1024. The plaintiff in *Davis*, like Kris Lindquist here, alleged a violation of his right to substantive due process. 143 F.3d at 1024. The sixth circuit held that under the substantive due process guarantee, the state does not owe a constitutional duty to protect its citizens from harm. 143 F.3d at 1024. However, relying on this Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the sixth circuit held that a duty was imposed once the state took the plaintiff into custody. By taking the plaintiff into custody, and releasing him on a dark highway, the defendant officers

"imposed upon themselves a duty to ensure that they were not placing [the plaintiff] in danger." 143 F.3d at 1024.

The sixth circuit also rejected the argument made by the Florida Court of Appeals in this case that under *DeShaney*, there is no duty owed because the injuries occurred after the plaintiff was released. The sixth circuit held that under *DeShaney*, if the state renders the person more vulnerable to harm, the substantive due process clause applies. 143 F.3d at 1025.

It is impossible to reconcile *Davis* with this case. In each case the police officers took an intoxicated individual into custody. In each case the police officers released that individual, knowing that he faced dangers if released. In each case a car hit the individual within a few minutes after he was released. Even though all of these facts are identical, in the Sixth Circuit the individual has a cause of action under the Fourteenth Amendment and 42 U.S.C. §1983. In Florida, he does not.

The Florida Court of Appeals' decision, which held that there was no constitutional duty cannot be reconciled with the Sixth Circuit's holding in *Davis*.[6] Under Rule 10, this Court should accept review of this case.

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[6] Under Supreme Court Rule 10(b), the grounds for granting *certiorari* include conflicts between a state court decision of last resort and federal court of appeals. Not included in the language of Rule 10(b) are conflicts between state court decisions and federal district court decisions. However, the grounds for acceptance of *certiorari* are not exclusively those listed in Rule 10. *C.f., Beahlien v. United States*, 497 U.S. 1038, 1039 (1990) (White, J., dissenting from denial of certiorari) (Justice White notes that the court has accepted review in important

II. The decision of the Florida Court of Appeals that there was no substantive due process violation because the injuries did not occur while "in custody" conflicts with the decision of the Sixth Circuit Court of Appeals in *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997).

The Fourth District's opinion focused on the fact that the injuries occurred after Kris Lindquist was released from custody. *Lindquist,* 706 So.2d at 360. Because the injuries occurred after he was released, the court found no constitutional violation. This reasoning directly conflicts with the Sixth Circuit Court of Appeals' decision In *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997).

In *Stemler*, as in this case, the police encountered a drunken individual, briefly held the individual in custody, and released the individual into a dangerous situation. The person was later injured in an automobile accident.

The court of appeals held that there was a special relationship between the police and the individual created by the custodial detention. The breach of the constitutional duty owed by the police occurred when they released the individual from their custody into a dangerous situation. Thus, the individual stated a claim under the substantive due process clause, even though the injuries occurred after their release from custody. 126 F.3d at 867.

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cases, not fitting into any of the three listed categories). The decision of the Florida Court of Appeals also directly conflicts with the decision of the federal district court in *Wagar v. Hasenkrug*, 486 F. Supp. 47 (D. Montana 1980).

While the facts of *Stemler* are slightly different than the facts in this case, the rule of law is the same. Here, the breach of the constitutional duty occurred at the time that the defendants decided to release Kris Lindquist. While one may distinguish the facts, one cannot reconcile the difference in the holding of *Stemler* and the holding in this case. Under Rule 10, this court should grant review.

III. The decision of the Florida Court of Appeals conflicts with the decision of the Third Circuit Court of Appeals in *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996), which found a substantive due process violation under the "state created danger" theory.

The decision of the Florida Court of Appeals also conflicts with the decision of the Third Circuit in *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996).[7] In *Kniepp* the court found a substantive due process violation under the "state-created danger" theory. Under this theory, if police action increases the danger to an individual, the substantive due process clause imposes a duty upon the police to protect that person, even if the person was not in custody at any time. *Lewis v. Sacramento County*, 98 F.3d 434, 440 (9th Cir. 1996); *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993).

In this case, the complaint alleged that

> Officer Andrew Woronka specifically knew that the neighborhood around the City of Riviera Beach Police Station was more

[7] *Kneipp* was decided on September 8, 1996, two days after the circuit court's decision in this case.

> dangerous that [sic] the area where Kris Lindquist was arrested, and that Kris Lindquist faced dangers in walking home from the police station. This danger included the fact that the police station sits at the intersection of two multiple-lane, heavily trafficked roadways.
>
> Further, Officer Steven Lobeck specifically knew that Kris Lindquist faced increased dangers in attempting to walk home from the City of Riviera Beach Police Station, and Officer Lobeck told Officer Woronka to drive Kris Lindquist home, if necessary to protect Kris Lindquist.

(R.315-316, ¶¶44, 45).

These allegations fall squarely under the state-created danger theory, according to *Kneipp*. In *Kneipp*, the Third Circuit Court of Appeals held that police officers do have a duty to intoxicated persons who come under their care, to not release those persons into a dangerous environment.

In *Kneipp* the plaintiff and her husband had been drinking at a tavern. They were walking home when the defendant Tedder, a Philadelphia police officer, stopped them. 95 F.3d at 1201. Three other police officers then arrived at the scene as the defendant Tedder interviewed the plaintiffs. 95 F.3d at 1201-1202. The plaintiff's husband asked the police officers if he could go home, and one of the police officers said "yeah sure." 95 F.3d at 1202. When the plaintiff's husband started walking home, his wife was leaning on the front of one of the police cars. 95 F.3d at 1202.

The husband went home and waited for the plaintiff, who did not return home. About two hours later, at approximately 1:51 a.m., a police officer found the plaintiff unconscious at the bottom of an embankment. She was suffering from hypothermia, which caused severe brain damage. 95 F.3d at 1203.

The plaintiff then sued the police officers and the City of Philadelphia under 42 U.S.C. §1983. The plaintiff's complaint alleged that the police officers' acts in sending her husband home and leaving her to fend for herself in an obviously intoxicated and impaired condition, violated her substantive due process rights. 95 F.3d at 1203. The defendants moved for summary judgment arguing that no "special relationship" existed between the officers and the plaintiff, and that the "state-created" danger theory did not apply. The district court granted the motion for summary judgment, but the third circuit reversed.

In reversing the district court, the court of appeals first turned to the basics of §1983 liability. The court noted that §1983 "does not, by its own terms, create substantive rights; it provides only remedies for deprivations of rights established elsewhere in the Constitution or federal laws." 95 F.3d at 1204. In the case before it, the plaintiff alleged that her substantive due process rights had been violated.

To examine the plaintiff's substantive due process claims, the court turned to this Court's decision in *DeShaney*. The court of appeals concluded that no "special relationship" under *DeShaney* existed because the plaintiff had not been in custody. 95 F.3d at 1205.

However, the court concluded that a substantive due process violation did exist under the "state created danger" theory. The court of appeals held that *DeShaney* did not foreclose this theory, and that courts following *DeShaney* had expressly held that a substantive due process claim can be stated if the state creates the danger that ultimately led to the plaintiff's harm. 95 F.3d at 1205. While no previous case before the third circuit had presented an opportunity to examine this theory, the court held that the case *sub judice* did present such an opportunity. 95 F.3d at 1205.

Relying in part on *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) *cert. denied*, 498 U.S. 938 (1990) the *Kneipp* court held that summary judgment was inappropriately granted. The court held that there are four common elements to the "state created danger" theory.

> (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

95 F.3d at 1208.

Applying these elements to the facts before it, the court held that summary judgment was inappropriate. First, the court held that the injuries were foreseeable. The plaintiff's blood alcohol level was .25%. This, coupled with other testimony that the plaintiff's ability to walk was impaired would have allowed a reasonable trier of fact to conclude that

the it was foreseeable that the plaintiff would have been injured if not escorted home. 95 F.3d at 1208.

Second, the court found that there was sufficient evidence to conclude that the police officers acted in willful disregard for the plaintiff's safety. The defendant admitted that they knew the plaintiff was drunk, and then lied about sending the husband home separately. 95 F.3d at 1208-1209.

Third, the court found that there was a relationship between the state and the plaintiff during which the state placed the plaintiff in a danger of injury. The court said that this relationship is different from the "special relationship" created by persons in custody under *DeShaney*.

> The relationship requirement under the state-created danger theory contemplates some contact such that the plaintiff was a foreseeable victim of a defendant's acts in a tort sense. The special relationship in *DeShaney*, on the other hand, has a custodial element to it--the state must affirmatively act to restrain an individual's freedom to act on his or her own behalf either through incarceration, institutionalization, or some other comparable limit of personal liberty.

95 F.3d at 1209, fn. 22. (citations omitted). The *Kneipp* court concluded that the defendant, "exercising his powers as a police officer, placed [the plaintiff] in danger of foreseeable injury when he sent her home unescorted in a visibly intoxicated state in cold weather." 95 F.3d at 1209.

Fourth, the court found that the conduct of the police officers made the plaintiff more vulnerable to harm. The court held that "[I]t is conceivable that, but for the intervention of the police, [the husband] would have continued to escort his wife back to their apartment where she would have been safe." 95 F.3d at 1209.

Once again, the parallels between this case and *Kneipp* are compelling. In each case, the police officers came into contact with a visibly intoxicated person. In each case, the person was disoriented and unable to care for his or her own safety. In each case, the situation into which the person was released was dangerous. In *Kneipp*, the danger came from the extremely cold conditions. Here, the danger came from the nature of the area surrounding the police station.

Of course, more compelling in this case that in *Kneipp* is the fact that the Defendants in this case specifically knew of the danger facing Kris Lindquist. Both Woronka and Lobeck expressed concern about Lindquist's ability to get home yet neither took any steps to remove the danger. The complaint alleges that

> Officer Andrew Woronka specifically knew that the neighborhood around the City of Riviera Beach Police Station was more dangerous that [sic] the area where Kris Lindquist was arrested, and that Kris Lindquist faced dangers in walking home from the police station. This danger included the fact that the police station sits at the intersection of two multiple-lane, heavily trafficked roadways.

> Further, Officer Steven Lobeck specifically knew that Kris Lindquist faced increased dangers in attempting to walk home from the City of Riviera Beach Police Station, and Officer Lobeck told Officer Woronka to drive Kris Lindquist home, if necessary to protect Kris Lindquist.

(R.315-316, ¶¶44, 45).

After Kris Lindquist was struck by the car, the complaint also alleged that Defendant Lobeck[8] attempted to conceal the identity of Kris Lindquist and concealed evidence linking him to a recent arrest by the police department. (R.318, ¶54). The court in *Kneipp* stressed that the defendant's actions in falsely testifying that he sent the plaintiff home with her husband was relevant to the issue of knowledge. 95 F.3d at 1208-09. Defendant Lobeck's similar actions, seeking to "cover up" the fact that Kris Lindquist had just been released, also demonstrate knowledge by Lobeck sufficient to impose liability.

Here, the complaint alleges that the Defendants placed Kris Lindquist in a position of danger then released him without taking any steps to protect him from that danger. Under the "state created danger" prong of the substantive due process guarantee, the complaint states a cause of action for deprivation of Kris Lindquist's substantive due process rights.

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[8] Paragraph 54 begins "Officer Woronka . . . ." This is a typographical error, as the paragraph then discusses what Officer Lobeck did. (R.318, ¶54).

The only way to "reconcile" the Florida Court of Appeals' decision with *Kneipp* is to ignore the facts as alleged in the complaint. This is precisely what the Florida Court of Appeals did. The court ignored the allegations of the Fourth Amended Complaint and substituted its own conclusions about the "facts." According to the Fourth District, both the site of Kris Lindquist's arrest and the site of his release were on the same street, so there was no harm. *Lindquist*, 706 So. 2d at 361. This conclusion ignored the allegations that the place of arrest was different from the place of release, an intersection of two multiple-lane, heavily traveled highways.

Unfortunately, the Fourth District did not explain the nature of the testimony that supported its conclusion. Nor did the Fourth District explain the legal principle that allowed it to substitute its own view of the facts for the allegations in the complaint, violating the fundamental principle of appellate review on a motion to dismiss under FLA. R. CIV. PROC. 1.140(b)(6). Under that rule, the only facts presented for review are the facts stated in the "four corners" of the complaint. *Pizzi v. Central Bank and Trust Co.*, 250 So. 2d 895, 897 (Fla. 1971).

Finally, the Fourth District labeled as "troublesome" the fact that the two officers knew that Kris Lindquist faced dangers if released alone, yet did nothing to prevent that danger and took steps to conceal Kris Lindquist's identity. 706 So.2d at 362, fn. 4. This was far more than merely "troublesome." Instead, the officer's specific knowledge of the risk of harm to Kris Lindquist made him a "foreseeable plaintiff" sufficient to impose liability under the "state

created danger" theory. *See, Martinez v. California*, 444 U.S. 277, 285 (1980).

The Florida Court of Appeals' decision cannot be reconciled with the Third Circuit Court of Appeals' decision in *Kneipp*. Under Rule 10, this court should accept review of this matter.

CONCLUSION

This case falls squarely within Rule 10's requirements for review by this court. If this case is not reviewed, at least in Florida, police departments will be able to release prisoners without regard for the perils confronting those prisoners. It is easy to conceive of whole categories of custodial arrestees, including the mentally ill, who can be released without regard to the conditions of their release. If they are struck by cars or die of exposure, there is no constitutional liability. Even more troubling is the possibility that other courts will follow the Florida Court of Appeals' lead and use a similar analysis.

Even absent further action by other courts, we now have two different constitutional schemes: one scheme protecting custodial detainees in the Third and Sixth Circuits, and another scheme, providing no protection for custodial detainees in Florida. This court should review this case, both to resolve this conflict and to forestall any further erosion of the Fourteenth Amendment's substantive due process clause.

Respectfully submitted,

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APPENDIX

Supreme Court of Florida

MONDAY, JULY 27, 1998

KRIS LINDQUIST,

Petitioner,

V.

ANDREW WORONKA, et al.,

Respondents

AMENDED ORDER

CASE NO. 92,492

District Court of Appeal, 4th District - No. 96-3021

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

HARDING, C.J. and OVERTON, WELLS, JJ. and KAHN, visiting judge, concur. SHAW, KOGAN and ANSTEAD, JJ., dissent.

A True Copy

Teste
/s/
Sid J. White
Clerk, Supreme Court

Hon. Marilyn N. Beuttenmuller, Clerk
Hon. Dorothy H. Wilken, Clerk
Hon. Jack H. Cook, Judge
Mr. Reed Millsaps
Mr. Anthony J. Palmer
Mr. Glen Torcivia
Mr. Don Stephens
Mr. Stephen F. Radford, Jr.
Ms. Karen Childers
Ms. V. Lynn Whitfield

706 So.2d 358
23 Fla. L. Weekly D337
(Cite as: 706 So.2d 358)

Kris Linduist, Appellant,
v.
Andrew Woronka and Steven Lobeck,
Appellees.

No. 96-3021.

District Court of Appeal of Florida, Fourth District.

Jan. 28, 1998.

PER CURIAM.

Appellant, Kris Lindquist (plaintiff), appeals the trial court's dismissal with prejudice of those counts of his fourth amended complaint which are against appellee police officers Andrew Woronka and Stephen Lobeck (defendants).[1] Claiming that defendants' conduct deprived him of due process, plaintiff sought to impose individual liability on defendants, pursuant to 42 U.S.C. §1983, for injuries he sustained in a traffic accident after being released from police custody. Because we find that the officers did not have a special relationship with plaintiff requiring them to protect him at the time he was injured, and were not otherwise legally responsible for acting to create the dangerous

[1] The counts against the City of Riviera Beach are still pending and are not involved in this appeal.

situation that resulted in his injuries, we affirm the trial court's dismissal.

On January 31, 1993, plaintiff was arrested by defendants while they were on duty with the City of Riviera Beach Police Department. At the time of his arrest, plaintiff was intoxicated, disoriented, confused, unaware of his surroundings, and otherwise incapacitated. After his arrest, defendants drove plaintiff approximately two miles to the City of Riviera Beach Police Department headquarters. There, pursuant to department policy, plaintiff was charged with disorderly conduct,[2] and then released with a notice to appear at a future court date.

After his release, while crossing the highway near the police station on foot, plaintiff was struck by a vehicle. As a result of the accident, plaintiff suffers from various permanent injuries including: paralysis of one side of his body; traumatic brain injury; vision impairment; loss of mobility and loss of ability to communicate. He requires full-time care.

Plaintiff does not allege that he was falsely arrested or falsely imprisoned. Rather, he claims the opposite--that defendants should have kept him in custody for his own protection because he was obviously inebriated. Alternatively, plaintiff alleges that the police officers should

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[2] Plaintiff alleges that the decision to charge him with disorderly conduct instead of disorderly intoxication was pursuant to a policy and procedure adopted by the City of Riviera Beach in order to avoid "proof problems" at trial. The allegations of a governmental policy constituting a violation do not form the basis for imposing individual liability on the police officers.

have driven him home. Plaintiff claims that defendants instead knowingly released him from the City of Riviera Beach Police Station, "an area more dangerous than the area where [he] was arrested," thus exposing him to increased danger.

The trial court dismissed the civil rights claims against defendants, after allowing plaintiff three previous amendments, on the basis that the defendants' action, or inaction, did not rise to the level of a constitutional violation, pursuant to 42 U.S.C. §1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State ... subjects, or causes to he subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proof p~ for redress.

When considering the propriety of the trial court's dismissal of the complaint or counts of the complaint under §1983, this court must consider all the allegations contained in the complaint to be true. *See Hughes v. Rowe*, 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d 163 0980); *Harris v. Monds*, 696 So.2d 446 (Fla. 4th DCA 1997). To state a cause of action for violation of §1983, the plaintiff must allege that a person, acting under color of state law, deprived him of rights protected under the federal constitution, or federal laws. *See Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). Complaints alleging a violation of this statute

should not be dismissed unless it is clear that plaintiff is entitled to no relief under any facts given in support of the claim. *See Southern Alliance Corp. v. City of Winter Haven*, 505 So.2d 489 (Fla. 2d DCA 1987) (citing *Cruz v. Cardwell*, 486 F.2d 550 (8th Cir. 1973)).

The trial court relied on *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), in dismissing the complaint against defendants. In that case, after being returned to his father's care by Winnebago County social services despite repeated warnings and signs that he was in danger, four-year-old Joshua DeShaney was beaten so severely by his father that he suffered permanent brain damage and was left profoundly retarded.

The DeShaneys brought an action under §1983 against the county and individual social workers, alleging that the defendants deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, "by failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known." *Id.* at 193,109 S.Ct. at 1002.

The Supreme Court affirmed summary judgment in the defendants' favor, holding that the defendants' failure to protect Joshua from his father's violence did not violate Joshua's substantive due process rights. In reaching this conclusion, the Supreme Court recognized that:

> Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the

> grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father.

Id. at 202-03, 109 S.Ct. at 1007.

The Supreme Court rejected the DeShaneys' claims that a "special relationship" existed between the defendants and Joshua DeShaney such that they had a duty to provide protective services. The Supreme Court recognized, however, that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals ... because the person is unable 'by reason of the deprivation of his liberty to care for himself....'" *Id.* at 199, 109 S.Ct. at 1005.

> Taken together, [these cases] stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.

Id. at 199-200, 109 S.Ct. at 1005. The Supreme Court found that this "special relationship": analysis had no applicability in the DeShaney case because Joshua was not in the state's custody when he was injured by his father.

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf--through incarceration, institutionalization, or

> other similar restraint of personal liberty--which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

DeShaney, 489 U.S. at 200, 109 S.Ct. at 1006.

Recognizing that the circumstances may have imposed upon defendants the duty to act under state tort law, the Supreme Court concluded that the Due Process Clause of the Fourteenth Amendment "does not transform every tort committed by a state actor into a constitutional violation." *Id.* at 202, 109 S.Ct. at 1006 (emphasis supplied). Because "the State had no constitutional duty to protect Joshua against his father's violence, its failure to do so--though calamitous in hindsight-simply does not constitute a violation of the Due Process Clause." *Id.*

Here, plaintiff was not in custody at the time of the accident, nor was his liberty otherwise restrained. Thus, we find that plaintiff's first theory of liability, based on a special relationship, does not apply. Rather the basis for liability, if any, would derive from the following statement in *DeShaney*:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it

> not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.

Id. at 201, 109 S.Ct. at 1006 (emphasis supplied).

Although this alternative basis for liability under the due process clause is only *dicta* in *DeShaney*, subsequent federal court decisions have labeled it the "state-created danger" theory.[3]

In this case, the allegations against defendants, that after properly arresting plaintiff they brought him to the police station and subsequently released him, are insufficient to state a cause of action under the state- created danger theory. This case is a far cry from the case most favorable to plaintiff's position, *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996).

In *Kneipp*, the plaintiff was walking home with her husband, after midnight, when the two were stopped by the defendant police officers for creating a disturbance on a public highway. In an effort to separate the spouses, police sent the husband home and left the plaintiff on her own, despite the fact that the plaintiff was visibly drunk and unable to walk or care for herself. The plaintiff was found hours later at the bottom of an embankment across the street from her

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[3] *See Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996); *Reed v. Gardner*, 986 F.2d 1122 (7th Cir.1993); *Gregory v. City of Rogers, Arkansas*, 974 F.2d 1006 (8th Cir. 1992), and cases cited therein; *see also Wyke v. Polk County School Bd.*, 129 F.3d 560, 567 (11th Cir. 1997), and cases cited therein.

home, unconscious and suffering from hypothermia, resulting in severe and permanent brain damage.

The third circuit rejected a theory of liability predicated on a special relationship because the plaintiff was not injured while in police custody, but found a jury could hold defendants liable under the state-created danger theory. The court found that there was sufficient evidence to show that the defendant police officers used their authority to create a dangerous situation or to make the plaintiff more vulnerable to danger than had they not intervened. In sending her husband home, and allowing plaintiff to go home unescorted in a seriously intoxicated state in cold weather, they made her more vulnerable to harm. The court reasoned:

> It is conceivable that, but for the intervention of the police, [the plaintiff's husband] would have continued to escort his wife back to their apartment where she would have been safe. A jury could find that [the plaintiff] was in a worse position after the police intervened than she would have been if they had not done so. As a result of the affirmative acts of the police officers, the danger or risk of injury to [the plaintiff] was greatly increased.

Id. at 1209.

Here, plaintiff was initially arrested in the area of Blue Heron Boulevard, a multiple-lane highway, and then transported two miles to the City of Riviera Beach Police Department, which is also located on Blue Heron Boulevard. Although plaintiff alleges that defendants placed him in a more dangerous position by his arrest and release, the release

of plaintiff at the Riviera Beach police station which happens to be located near an intersection, is insufficient, under the cases on which plaintiff relies, to impose civil rights liability on defendants.[4] No court has yet found a violation of an individual's due process rights under similar facts. We have considered plaintiff's remaining arguments and find them to be without merit.

AFFIRMED.

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[4] There are two additional allegations. First, plaintiff alleges that Officer Lobeck told Officer Woronka to drive plaintiff home, if necessary, "to protect Kris Lindquist's safety." Second, plaintiff alleges that Officer Woronka went to the accident scene and "removed the identification from Kris Lindquist's person" in order to "conceal the culpability of the Riviera Beach Police Department." Although these allegations are troublesome, they do not constitute a basis for imposing individual liability on the police officers under §1983 as a violation of plaintiff's constitutional rights.

Supreme Court, U.S.
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No. 98-651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KRIS LINDQUIST,

Petitioner

vs.

STEVEN LOBECK and ANDREW WORONKA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

As detailed below, there is no cause for this Court to review the Florida District Court of Appeal's decision in *Lindquist v. Woronka*, 706 So. 2d 358 (Fla. 4th DCA 1998), because that decision accurately analyzes the law of substantive due process and applied that law to the unique facts of the case. Moreover, there is no cause for review because this claim is not yet ripe. The Florida District Court of Appeal acknowledged that the counts against the City of Rivera Beach are still pending in the lower court. *Lindquist,* 706 So. 2d at 358 n.1. Respondents also represent to this Court that Petitioner's claims against the City arising out of the same incident are still pending in the lower court.

A. The facts of the incident in this case.

The lower court found that:

> . . . [P]laintiff was arrested by defendants while they were on duty with the City of Riviera Beach Police Department. At the time of his arrest, plaintiff was intoxicated, disoriented, confused, unware of his surroundings, and otherwise incapacitated.

Lindquist, 706 So. 2d at 358.

> Plaintiff was initially arrested in the area of Blue Heron Blvd., a multiple-lane highway, and then transported two miles to the City of Riviera Beach Police Department, which is also located on Blue Heron Blvd.

Lindquist, 706 So. 2d at 358.

> Then, pursuant to department policy, plaintiff was charged with disorderly conduct [footnote omitted], and then released with a notice to appear at a future court date. After his release, while crossing the highway near the police station on foot, plaintiff was struck by a vehicle.

Lindquist, 706 So. 2d at 358. Finally, the lower court reasoned that:

> Although Plaintiff alleges that defendants placed him in a more dangerous position by his arrest and release, the release of plaintiff at the Riviera Beach police station which happens to be located near an intersection, is insufficient, under the cases on which plaintiff relies, to impose civil rights liability on defendants.

Lindquist, 706 So. 2d at 360.

REASONS FOR DENYING THE WRIT

Petitioner argues that there exists a "compelling reason" warranting review of the state court decision in *Lindquist v. Woronka*, 706 So. 2d 358 (Fla. 4th DCA 1998), because the Florida District Court of Appeal has "decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." (Pet., p. 5.) Specifically, Petitioner argues that *Lindquist, supra*, directly conflicts with the holdings in *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998); *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997) and *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996), and that this Court should therefore issue the Writ of Certiorari.

Respondents, on the other hand, first argue that this case is not ripe for review because Petitioner has not yet suffered an adverse consequence resulting from the lower court's opinion. Further, there is no conflict among the circuits and the Florida Appeals Court. The unique and differing facts of the cases presented by Petitioner do not conflict with the Florida Court of Appeals. In addition to the lack of a conflict, there is no evidence of inconsistent approaches taken by lower courts in determining when the failure of a state or governmental entity to provide an individual with adequate protective services constitutes a violation of substantive due process. *See DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 194, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989), and its progeny. Indeed, this Court decided *DeShaney* because the particular substantive due process issue, at that time, was of "importance to the issue of the administration of state and local governments." *DeShaney*, 489 U.S. at 194. *DeShaney* effectively set the parameters of substantive due process rights for persons detained and released by law enforcement officials.

A.

THE RIPENESS DOCTRINE PRECLUDES REVIEW BY THIS COURT.

After a careful review of the limited record in this case, this Court should determine that, because of both jurisdictional and prudential concerns, the present case or controversy is not ripe for judicial review. Article III of the United States Constitution limits the jurisdiction of federal courts to cases and controversies of sufficient concreteness to evidence a ripeness for review. *See* U.S. Const. art. III, § 2, cl. 1. "Even when the constitutional minimum has been met, however, prudential considerations may still counsel judicial restraint." *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931,

940 n.12 (D.C. Cir. 1986). The ripeness doctrine is designed to protect federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes. "The doctrine seeks to avoid entangling courts in the hazards of premature adjudication." *Abbott Lab. v. Gardner*, 387 U.S. 136, 148, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681 (1967).

The ripeness inquiry requires a determination of: (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of withholding court consideration. *Abbott*, 387 U.S. at 149, 87 S. Ct. at 1515-16; *see also Cheffer v. Reno*, 55 F.3d 1517, 1524 (11th Cir. 1995). Courts must resolve

> whether there is sufficient injury to meet Article III's requirement of a case or controversy and, if so, whether the claim is sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decision-making by the court.

Cheffer, 55 F.3d at 1524.

First, the issues in this case are not sufficiently defined and concrete because the record is not well developed. Specifically, Petitioner alleges that the Florida District Court of Appeals decision conflicts with three federal circuit court opinions: *Davis, supra*; *Stemler, supra* and *Kneipp, supra.* Each of those decisions was rendered after a record was developed for purposes of summary judgment. The record in the instant case is merely based on allegations in a complaint, without the guidance of a full factual record. For example, Petitioner's claim is based on the type of substantive due process this Court recognized in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 200, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). In that case, this Court had the benefit of a record on

summary judgment. Subsequent cases construing the contours of the type of substantive due process recognized in *DeShaney, supra*, were also decided on summary judgment records. *See, e.g., County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1717, 140 L. Ed. 2d 1043 (1998).

Second, there is not a sufficient injury justifying review of the claim. The limited issue on appeal — whether the Florida District Court of Appeal's interpretation of the facts of this case constitutes a claim for substantiative due process as against police officers in their individual capacity — is not dispositive of the case.[1] Petitioner's constitutional and state tort claims against the municipality are still pending in the trial court. This Court has recognized that even when jurisdiction exists it should not be exercised unless the case "tenders the underlying constitutional issues in clean-cut and concrete form." *Rescue Army v. Municipal Court*, 331 U.S. 549, 584, 67 S. Ct. 1409, 1427, 91 L. Ed. 1666 (1947). Problems of prematurity and abstractness may well present "insuperable obstacles" to the exercise of the Court's jurisdiction, even though that jurisdiction is technically present. *Id.* at 574, 67 S. Ct. at 1422. Thus, a court is only obligated to rule upon those properly presented questions that are necessary for decision of the case. *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 n.2, 92 S. Ct. 1716, 32 L. Ed. 2d 317 (1972) (when the issues are not presented with the clarity needed for effective adjudication, appellate review inappropriate). Because of the procedural stance of this case, Petitioner does not face the immediate prospect of sustaining some direct injury as a result of the Florida Court of Appeal's opinion because Petitioner's alternate claims (against

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1. Even if Petitioner has stated a substantive due process claim against the individual police officers, certainly this right was not so clearly established as to deprive those officers, sued in their individual capacities, of the protection afforded by qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

the government agency) are still pending in the trial court. *See, e.g., Cole v. Richardson*, 405 U.S. 676, 92 S. Ct. 1332, 31 L. Ed. 2d 593 (1972).

B.

THE DECISION OF THE FLORIDA DISTRICT COURT OF APPEALS DOES NOT CONFLICT WITH *DESHANEY* AND ITS PROGENY.

The record before this Court is not suitable for considering the broad question of whether this Court should expand the concept of substantive due process. First, this Court must focus on the allegations in the complaint to determine whether Petitioner's description of the purported constitutional right at stake and what the individually-sued police officers of the City of Riviera Beach did to allegedly deprive Petitioner of that right "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Collins v. Harker Heights*, 503 U.S. 115, 128, 112 S. Ct. 1061, 1070, 117 L. Ed. 2d 261 (1992). This Court is being asked to conduct a reading of the complaint that would be contrary to the lower court's review. Ultimately, Petitioner argues that this Court should expand the notion of substantive due process so that the facts as alleged in the complaint fit within its narrow contours.

This Court has "always been reluctant to expand the concept of substantive due process. *Collins, supra*, at 125, 112 S. Ct. at 1068; *Regents v. Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26, 106 S. Ct. 507, 513-14, 88 L. Ed. 2d 523 (1985). This Court is disinclined to expand the concept of substantive due process because:

> guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. The

> doctrine of judicial restraint requires us to exercise at utmost care when we are asked to break new ground in this field.

Harker Heights, 503 U.S. at 125, 112 S. Ct. at 1068. In particular, the Due Process Clause does "not transform every tort committed by a state actor into a constitutional violation." *DeShaney*, *supra* at 202. Rather, only in

> ***certain limited circumstances*** the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals . . . because the person is unable "by reason of the deprivation of his liberty to care for himself." . . .

DeShaney, *supra* at 199 (emphasis added). Because the "certain limited circumstances" mandate is clear and was not misinterpreted by the Florida Court of Appeals, the petition should be denied.

Indeed, this Court should not expand the contours of substantive due process. Petitioner argues that it is impossible to reconcile the Florida Court of Appeal's opinion with *Davis*; *Stemler* and *Kneipp*, *supra*, unless this Court ignores the facts as alleged in the complaint. (Pet., p. 17). However, this Court can reconcile the Florida Court of Appeals decision by recognizing the challenges posed by the narrow contours of substantive due process:

> If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. ***As a general matter, then, we conclude that a State's***

> ***failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.***

DeShaney, 489 U.S. at 196-197 (emphasis added). In this case, Officers Woronka and Lobeck allegedly detained and arrested Petitioner and then released him from custody. Petitioner was then was struck by an automobile driven by another individual, a tortfeasor. It is this individual, the tortfeasor driver of the private vehicle, whose "violence" caused injuries to the Petitioner. It is this type of private activity that simply does not fit within the narrow contours of substantive due process.

As the *DeShaney* Court noted,

> [i]t may well be that, by voluntarily undertaking to protect Joshua [the victim] against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger.

DeShaney, 489 U.S. at 201-202.

> The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf . . . In the substantive due process analysis, ***it is the State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarceration***, institutionalization, or other similar restraint of personal liberty — which is the "deprivation of liberty" triggering the protections of the Due Process Clause, ***not its failure to act to***

> ***protect his liberty interests against harms inflicted by other means.***

DeShaney, 489 U.S. at 199-200 (emphasis added). As shown below, the Petition should be denied because the police officers in this case, unlike other cases relied upon by Petitioner, had no duty to protect Petitioner against "harms inflicted by other means" such as third party motorists.

1. The facts alleged in the complaint do not establish a deprivation of substantive due process within the contours already well-established by this Court.

Petitioner heavily relies upon dicta in *DeShaney* to expand the concept of substantive due process. Yet, even if this Court were to grant the petition, it should be reluctant to expand the notion of substantive due process given the limited, narrow facts in the record. For example, there is no allegation that the initial deprivation of Petitioner's liberty caused Petitioner not to care for himself. The facts do not show that during Petitioner's detention anything was done to him to make him more intoxicated or disoriented. Nor do the facts show that Plaintiff was placed in a situation more dangerous than he had already been in. Indeed, the complaint does not even indicate any particulars about where Petitioner was located at the time of his arrest, so as to determine if similar dangers existed prior to, and after, Petitioner's arrest. Thus, the record severely limits this Court's determination of whether the narrow exception of *DeShaney* applies.

> It should not be surprising that the constitutional concept of conscience-shocking duplicates no traditional category of common-law fault, but rather points clear away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability.

County of Sacramento v. Lewis, 118 S. Ct. 1708, 1717, 140 L. Ed. 2d 1043 (1998). This Court has therefore rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct. Rather, it has recognized that "behavior on the other end of the culpability spectrum" most probably supports a substantive due process claim. *Lewis, supra* at 1718. The record in this case does not even remotely establish behavior at that other end of the culpability spectrum. Further, this Court recently reasoned that culpability falling within the middle range, following from something more than negligence but "less than intentional conduct" is a "matter for closer calls." *Lewis, supra*, at 1718 (no substantive due process violation where case fails to meet the shocks-the-conscience test). Even if the record in this case were sufficient to establish a "close-call", prudence should lead this Court to deny a petition based on a close-call and a limited record.

2. The Petition misrepresents the factual disparities of the alleged conflicting appellate decisions.

In furtherance of his assertion that there is a conflict between the circuit court of appeals and the Florida Appeals Court, Petitioner has distorted the facts of the three cases upon which he relies to justify review by this Court. A review of the facts of the circuit court of appeals decisions illustrates the grave dissimilarities in facts and thus ignores the importance of how each circuit court of appeal was able to determine that the alleged facts of those cases met the "shocks-the-conscience" test. Finally, each of the circuit court of appeals cases are procedurally different because they were reviewed in the scope of summary judgment proceedings where a factual record was established, rather than mere allegations in a complaint.

POINT I: *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998)

Davis was decided after a record was established for purposes of a summary judgment proceeding. *Davis, supra*, at 1023. According to the published opinion, Davis consumed a substantial amount of alcohol, later attempted to enter a local mission, was refused admission because of his inebriated condition, became violent, and then broke some windows in the mission. The police were called and later arrested Davis for intoxication and disorderly conduct. Because the local jail was full, Davis was ordered released if he "was not so drunk that he would be a hazard to himself." *Davis, supra*, at 1023. Disregarding the order, officers handcuffed Davis, placed him in a patrol car, drove him to area outside of the city limits, and released Davis at the entrance to a beach on a road with a 55-mile-per-hour speed limit, few street lights, and no sidewalk. It was also alleged and disputed by the defendants that the officers told Davis that they were dropping him off outside the town limits to "teach him a lesson." *Id.* Davis headed back into town and asked a town resident to call the police. A police officer arrived at the scene, allegedly refused to give Davis a ride back into town, and a few minutes later Davis was hit by a car. The officer alleged that Davis rejected his assistance, calling him "just another damn white officer." The Sixth Circuit relied upon party stipulations and a summary judgment record to make its factual determination that a jury might find a substantial due process violation.

In the instant case, there is no allegation that Petitioner was taken out of the city limits, was placed at an area near a beach or on a 55 mile-per-hour road that was dimly lit and had no sidewalks. Nor is there an allegation that Petitioner, after leaving the police station, asked for a ride back to town, but was refused. Petitioner has distorted the facts of *Davis* in his petition by omitting the fact that it was alleged that the police

officers disregarded an order to release Davis only if he was not a hazard to himself, that Davis was released near an entrance to a beach, and that the officers told Davis they were going to "teach him a lesson." (Pet., pp. 6-7). While *Davis* may be a close-call, the instant case is not because the alleged facts are insufficient (and dissimilar to *Davis*) to determine if the narrow *DeShaney* exception applies.

POINT II: *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997)

Stemler was decided after a record was established for purposes of a summary judgment proceeding. According to the opinion, Stemler was involved in a fight with her boyfriend that had resulted in her being struck in the back of her head with a blunt object. Stemler and her inebriated girlfriend, Black, then entered a car and sped away from the scene, being chased by Black's boyfriend, who had previously slammed her against a wall. The chase ensued, but stopped temporarily in the driveway of a retired police officer for the City of Florence. He called 911 after the high-speed chase began again on the nearby residential streets. Later a Florence police officer intervened by pulling his police cruiser in front of the vehicles. At that time, Stemler ran to the police officer and explained how the intoxicated boyfriend was chasing her at a high speed. However, people at the scene accused Stemler of being a lesbian. The Florence police officer later submitted a police report claiming that he did not smell alcohol of the boyfriend's breath, contrary to statements he made to others at the scene. In addition, a blood test taken later of the boyfriend revealed a level above the legal limit. Other officers at the scene reiterated to the Florence police officer and others at the scene that Stemler was a lesbian. Thereafter, the Florence police officer suspected Stemler of being intoxicated. He arrested Stemler, but not the inebriated boyfriend. Other persons at the scene, including

police officers, tried to convince the Florence police officer that Stemler was not intoxicated and that he should arrest the boyfriend instead. Nevertheless, the boyfriend drove away from the scene and had an accident a few minutes later on a major highway. The accident resulted in the death of Black. The boyfriend was finally arrested for driving under the influence. The plaintiffs, the estate of Black and Stemler, alleged a substantive due process claim under 42 U.S.C. § 1983. The Sixth Circuit held that the defendant police officers knew or should have known that the boyfriend had assaulted Black earlier in the evening and that they chose to affirmatively place her in harm's way by allowing her to leave the scene with the boyfriend:

> The very notion that police officers should not have known that they could not force an incapacitated woman to drive off with an obviously drunk man who they had reason to believe had beaten her betrays a chilling and unacceptable vision of the role of the police in our society. In short, these facts support a substantive due process claim . . .

Stemler, supra, at 870. Clearly *Stemler* is a case at the "other end of the culpability spectrum" and thus meets the "shocks-the-conscience" test. This Court denied the petition for writ of certiorari in the case. *See City of Florence v. Chipman,* 118 S. Ct. 1796, 140 L. Ed. 2d 936 (1998).

In the instant case, there is no allegation that Petitioner was allowed to ride in a vehicle with an obviously intoxicated person who had previously assaulted him. Nor is there any allegation that police officers turned a blind eye to eyewitness statements and were motivated by possible prejudice based on the sexual orientation of a key witness. Moreover, the record in this case presents absolutely no evidence that the Riviera

Beach police officers affirmatively placed Petitioner in harm's way after an on-scene investigation that would have revealed that their actions in allowing the Petitioner to leave the scene would have been reasonably calculated to lead to an injury.

Petitioner has grossly distorted the facts of *Stemler* in his petition by simply illustrating the facts of the case as follows: "the police encountered a drunken individual, briefly held the individual in custody, and released the individual into a dangerous situation." (Pet., p. 9). While the facts of *Stemler* may also be a close-call (like *Davis*), the instant case is not because the alleged facts are insufficient (and dissimilar to *Stemler*) to determine if the narrow *DeShaney* exception applies.

POINT III: *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996)

Again, *Kneipp* was decided after a record was established for purposes of a summary judgment proceeding. According to the opinion, Kneipp and her husband were walking home after a night of drinking at a tavern on a January night in Philadelphia. The evidence showed that Kneipp's husband considered her visibly intoxicated because she staggered, smelled of urine, and was often unable to walk without assistance. Therefore, her husband had to carry her a portion of the way back to the apartment. *Kneipp, supra*, at 1201. A police officer later stopped Kneipp and her husband for causing a disturbance on the highway shortly after midnight. They were three blocks from their apartment. Kneipp leaned on the officer's car because she could not stand by herself. Other officers arrived at the scene. Kneipp's husband asked to leave the scene because he had to return home to relieve the babysitter. After he left the scene without Kneipp, the officers sent Kneipp home alone. Later, Kneipp's husband went back to look for Kneipp when she did not return home. When he saw the police officer parked nearby, he asked about what happened to Kneipp. The officer threatened

to arrest him, so he did not inquire further. Later, Kneipp was found at the bottom of an embankment next to a plaza near her home. She suffered from hypothermia and severe brain injury.

The Third Circuit reasoned that the police officers "used their authority to make [Kneipp] more vulnerable to danger had they not intervened." *Kneipp, supra*, at 1209. The Third Circuit focused on the cold weather and how that made Kneipp more vulnerable to harm. Moreover, the court opined that but for the intervention of the police, it was reasonable to conclude the Kneipp would have made it home safely with her husband. The court distinguished the facts of the case from the policy that "plaintiffs do not have a constitutional right to be protected by the police against harm inflicted by third persons." *Kneipp, supra*, at 1210.

In the instant case, there is no allegation that Petitioner was thwarted from any particular journey to return home. Petitioner was not so drunk that he could not walk home. Nor was Petitioner separated from a companion and thus left in a worse position that when the police first encountered him. Nor is there any allegation in this case that predictable weather conditions would have sufficiently warned police officers of a dangerous situation. Rather, the record is devoid of facts to determine if the case fits within the "guideposts for responsible decisionmaking" recognized in *DeShaney*. *See Harker Heights*, 503 U.S. at 125, 112 S. Ct. at 1068. All that the record establishes is that Petitioner, after being arrested for disorderly conduct and being intoxicated, was released by police officers on or near the same road he was arrested at, and thereafter a third party ran into Petitioner.

Again, Petitioner has distorted the facts of *Kneipp* in his petition by failing to include essential facts for a substantive due process analysis. For example, Petitioner did not include

the fact that Kneipp's husband asked the police officer about his wife's whereabouts after the initial encounter, nor did he mention the threat made to the husband by the police officer, or the extreme cold weather of that January night. (Pet., pp. 11-12). While the facts of *Kneipp* may also be a close-call (like *Davis* and *Stemler*), the instant case is not a close-call. Thus, there is no conflict among the Florida Court of Appeals decision and the three appellate decisions discussed in the Petition.

CONCLUSION

For the reasons given above, the petition should be denied because the case is not ripe for review and/or because there is no clear error in the lower court's application of the law of substantive due process. The facts of the cases relied upon by Petitioner are extremely dissimilar from the facts of the instant case. The facts of the instant case do not rise to the level of a recognized substantive due process violation.

Respectfully submitted,

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